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April 21, 2010

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 21, 2009

Case Number: TSO-0838

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization 1/ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be restored.

I. Background

The individual is employed at a Department of Energy (DOE) facility where her work requires her to have an access authorization. During a background investigation, the Local Security Office (LSO) discovered some derogatory information that created security concerns. The LSO asked the individual to participate in a July 2009 Personnel Security Interview (PSI) in order to resolve the information. The PSI did not resolve the security concerns.

In September 2009, the LSO sent a letter (Notification Letter) advising the individual that it possessed reliable information that created a substantial doubt regarding her eligibility to hold an access authorization. In an attachment to the Notification Letter, the LSO explained that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in

1/ Access authorization is defined as an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material. 10 C.F.R. § 710.5(a).

the security regulations at 10 C.F.R. § 710.8, subsections (j) and (k) (hereinafter referred to as Criteria J and K respectively). ^{2/}

Upon receipt of the Notification Letter, the individual filed a request for a hearing. The LSO transmitted the individual's hearing request to the Office of Hearings and Appeals (OHA), and the OHA Director appointed me as the Hearing Officer in this case. At the hearing that I convened, the individual presented the testimony of two witnesses, her supervisor and her husband. She also testified on her own behalf. The DOE Counsel did not present any witnesses. The LSO and the individual submitted a number of written exhibits prior to and during the hearing.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denial"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring her access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting her eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a

^{2/} Criterion J relates to information that a person has "[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j). Criterion K concerns information that a person has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(k).

person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization in favor of the national security. *Id.*

III. The Notification Letter and the Security Concerns at Issue

As stated above, the LSO cites two potentially disqualifying criteria as bases for suspending the individual's security clearance, Criteria J and K. To support Criterion J, the LSO relies on the following information: (i) the individual admitted to being in a rehabilitation program for alcohol, (ii) the individual admitted to having an alcohol problem once she entered into rehabilitation, and began attending Alcoholics Anonymous (AA), (iii) the individual admitted to using alcohol for self-medicating and sleeping after witnessing the murder of her first husband in 1985, and (iv) the individual admitted to receiving a Driving Under the Influence (DUI) offense in 1984. The LSO's Criterion K concerns are predicated on the individual's marijuana use. In particular, the LSO cites that the individual admitted to using marijuana while holding a security clearance, acknowledged that she had violated DOE's policy regarding illegal drug usage, verified her signature on a DOE Drug Certification and admitted to violating it, and acknowledged that her judgment was impaired the night she used marijuana and subsequently tested positive during a random drug test.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's alcohol use under Criterion J. The excessive consumption of alcohol itself is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See* Guideline G of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005, by the Assistant to the President for National Security Affairs, The White House. Likewise, there are significant security concerns associated with past or current illegal drug usage. First, engaging in criminal conduct can raise questions about a person's ability or willingness to comply with laws, rules and regulations. *See id.* at Guideline H. Second, illegal drugs can impair a person's judgment which, in turn, can raise questions about the person's reliability and trustworthiness. *Id.* Moreover, from a common sense standpoint, a person's reliability and trustworthiness is questionable when he or she knowingly associates with persons who use illegal drugs.

IV. Findings of Fact

The relevant facts in this case are uncontested. The individual began using marijuana occasionally as a teenager and then began smoking it regularly when she married her first husband. In 1984, the individual was arrested and charged with DUI. Then, in 1985, the individual witnessed the murder of her husband and began smoking marijuana and drinking alcohol to a greater extent. According to the individual, her marijuana use decreased to occasional use from 1991 to 2009. In 1998, in the process of being granted a security clearance, the individual signed a DOE Drug Certification in which she attested that she would not use illegal drugs and that any involvement with illegal drugs was grounds to revoke or suspend her security clearance. She estimates that she smoked marijuana

“maybe once every six months, if even that much,” during the time she has held a security clearance and admitted that she knowingly smoked while holding a clearance.

On June 20, 2009, the individual tested positive for marijuana as part of a random drug test. According to the individual, on June 13, 2009, she attended a barbeque with friends and smoked marijuana. DOE Exh. 7. The individual explained that she had received a random drug test six months prior to this incident and therefore was complacent when she decided to smoke marijuana at the barbeque. *Id.* The individual further explained that she was drinking beer at the time she smoked marijuana and estimated that she probably took four “hits” of marijuana as it was being passed around among several people. *Id.* The individual’s positive random drug test prompted DOE to refer the individual to the Employee Assistance Program (EAP) which recommended that the individual enter a rehabilitation program. On July 30, 2009, DOE conducted a PSI of the individual. During the PSI, the individual admitted to using marijuana while holding a security clearance and admitted to violating the DOE Drug Certification. The individual also admitted to having an alcohol problem and that on July 20, 2009, she began attending a rehabilitation program four nights a week. *Id.* at 6. She also admitted to attending AA and to using alcohol for self-medicating purposes. According to the individual, in the past, she has drank about six beers at once, but stated that she has never considered herself to be intoxicated. She stated that she last drank alcohol in July 2009 after the barbeque. *Id.*

V. Hearing Officer Evaluation of the Evidence

I have thoroughly considered the record in this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual’s eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c). 3/ After due deliberation, I have determined that the individual’s access authorization should not be restored. I cannot find that restoring the individual’s DOE security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

The Criterion K concerns raised by the LSO reflect the individual’s marijuana use and the Criterion J concerns reflect, *inter alia*, the individual’s alcohol consumption and participation in a rehabilitation program. During the hearing, the individual testified that she signed a DOE Drug Certification in 1998 when she first applied for her security clearance. Transcript of Hearing (Tr.) at 51. She further testified that although she reviewed DOE’s policy regarding illegal drugs, she probably did not understand it 11 years ago, but understands it now. *Id.* The individual admitted to smoking marijuana while holding a security clearance, recalling that she smoked it on at least four

3/ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

occasions between 2000 and 2009. *Id.* at 52. She testified that on each occasion, she knew what she was doing was illegal. *Id.* The individual also testified that her marijuana use generally occurred after she had consumed alcohol, which she considered a trigger to her drug use. *Id.* at 54. She testified that the last time she smoked marijuana occurred in June 2009. The individual, who described her behavior as “stupid,” further testified that based on the consequences of her behavior and the fact that marijuana is illegal, she has no intention of ever smoking marijuana again. *Id.* at 64. She provided documentary evidence demonstrating that she has had negative drug tests since her positive drug screen in June 2009. *See* Indiv. Exh. A. In addition, during the course of the hearing, the individual signed another DOE Drug Certification. Indiv. Exh. E.

With respect to alcohol, the individual testified that she first acknowledged that she had an alcohol problem in June 2009 after her positive drug test and her referral to a rehabilitation program. *Id.* at 57. She testified that other than the DUI she received in 1984, she has not had any other alcohol-related offenses. *Id.* at 58. She reiterated that she believes her alcohol use acted as a trigger to her use of marijuana and intends to remain sober in the future. *Id.* at 64. The individual testified that, until she was referred to a rehabilitation program through EAP, she never considered entering AA because she did not believe she had a problem with alcohol. *Id.* at 67. She admitted that, although she drank mostly on the weekends, she considered herself as being alcohol dependent in the past. *Id.* The individual testified that she has learned a great deal in alcohol treatment and AA and does not have the urge to drink. *Id.* According to the individual, the last time she drank alcohol was in July 2009, after her positive drug screen, and intends to completely abstain from alcohol in the future. She testified that she entered alcohol treatment in July 2009 and completed it in September 2009. *Id.* at 79. As for her current plans regarding her rehabilitation program, the individual testified that she intends to continue with an aftercare alcohol support group and would like to establish her own support group after she achieves a year of sobriety. *Id.* at 74. Finally, the individual testified that her life has changed since participating in alcohol treatment. She explained that she is happier and now has a more positive outlook on life. *Id.* at 86. The individual further testified that she exercises, meditates and has good support mechanisms, including a close relationship with her husband. *Id.*

The individual also offered the testimony of her supervisor and her husband. The individual’s supervisor, who has known the individual for two and a half years, testified that the individual is a model employee, has a good attitude and is a team player. *Id.* at 10. He further testified that he has never observed the individual using alcohol or drugs. *Id.* The individual’s husband, who has been married to the individual for eighteen years, testified that when he met the individual he knew she drank alcohol and smoked marijuana. *Id.* at 22. He testified that based on his disapproval, he asked the individual to stop smoking marijuana. *Id.* at 23. The individual’s husband testified that he did not know the individual was smoking marijuana after she obtained her security clearance and was upset and disappointed when she tested positive on a random drug test. *Id.* at 24. He testified further that since alcohol treatment, the individual has been happier and their marriage has improved. *Id.* at 26.

In evaluating the totality of the circumstances, I cannot conclude that the individual has sufficiently mitigated the LSO’s concerns surrounding her marijuana use, her admission of using marijuana

while holding a security clearance and her admission of violating the DOE Drug Certification. The individual's testimony convinced me that she understands the seriousness of her past drug usage and is now taking full responsibility for her actions. Further, the individual has provided credible assurances that she will not use drugs in the future, i.e., signing a DOE Drug Certification during the hearing. Her husband provided persuasive testimony to corroborate the individual's testimony on this point. Against these positive factors, however, I weighed the following negative ones. First, the individual's willful disregard for the law by using illegal drugs is a serious matter. Second, the individual's conduct with respect to her use of marijuana on several occasions while holding a security clearance was both voluntary and knowing. There is no evidence in the record that the individual would have stopped smoking marijuana had she not tested positive on a random drug test. Third, the individual's behavior with respect to her illegal drug use was recent, with her last marijuana use occurring just six months prior to the hearing. Based on these factors, I am unable to conclude at this time that the individual's past use of illegal drugs is unlikely to recur. Accordingly, after carefully weighing all the evidence, both favorable and unfavorable, I find that the individual has not presented sufficient evidence to mitigate the Criterion K security concerns at issue.

Likewise, I cannot conclude that the individual has mitigated the LSO's concerns regarding the individual's alcohol use. I commend the individual for the steps she has taken to address her alcohol problem, including her participation in an alcohol-treatment program, her attendance in AA, and her participation in an aftercare support group. I also believe the individual is sincere in her efforts to remain abstinent and to change her habits and lifestyle which, as she described, triggered her use of illegal drugs. However, I believe the individual's newly acquired awareness and acceptance of her alcohol problem have not yet withstood the test of time: as of the date of the hearing, only six months have passed since the individual's last drink and three months since the individual completed her rehabilitation program. The individual has not yet established a sufficient record of successful treatment and responsible use. Consequently, I must conclude that the individual has not mitigated the security concerns arising under Criterion J at this time.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria J and K. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the individual has not brought forth convincing evidence to mitigate the security concerns associated with Criteria J and K. I therefore cannot find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Kimberly Jenkins-Chapman

Hearing Officer
Office of Hearings and Appeals

Date: April 21, 2010